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No. 4255

United States Circuit Court
Of Appeals
For the Ninth Circuit

IN THE MATTER OF H. J. BRENEMAN, BANKRUPT.

H. J. BRENEMAN,

Petitioner,

vs.

M. F. CORRIGAN as Trustee in Bankruptcy of the Estate of H. J. Breneman, Bankrupt,

Respondent.

BRIEF FOR RESPONDENT

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STATEMENT

The precise question submitted by the petitioner is, can one spouse who is a bankrupt and also a

tenant of an estate by the entirety claim the whole of that estate as exempt under the Oregon law?

The trustee, respondent, answers this question as follows:

1st. Such a spouse has assured to him by recognition of the rules governing entirety estates a greater and more valuable estate in Oregon than is given to him through the Oregon exemption statutes.

2nd. The Oregon exemption statutes do not give an exemption right to one tenant of the entirety.

ANALYSIS AND COMMENTS ON PETITIONER'S BRIEF

Estates by the entirety are recognized in Oregon. It is conceded that an estate by the entirety is not an ordinary joint tenancy. (Page 13, Petitioner's Brief) Therefore cases deciding the rights to exemptions under joint tenancies are not in point.

> "Modern legislation has done much to destroy the unity of husband and wife, yet in spite of such legislation it is generally held that estates in entirety remain as at common law. * * * In case of a tenancy by entireties a fifth unity was added to the fourth common law unities, recognized in a joint tenancy, that is, unity

of person. A joint tenancy may be vested in any number of natural persons more than two. A tenancy by entireties can be vested in but two natural persons, and these two are regarded as but one in law. Joint tenants take by moieties; each one is seised of an undivided moiety of the whole, husband and wife take each an entirety and are seised per tout but not per my. Joint tenants may each alien his interest in the estate; husband and wife must alienate jointly. The former may sever their estates at pleasure; the latter hold an estate which, while it remains theirs, is inseverable. The former can have partition; but the latter can not, unless indeed in a divorce proceeding severing their matrimonial relations. The former may succeed to his cotenant's moiety by right of survivorship, while upon the decease of either of the spouses, the other continues holding the entire estate. 13 R. C. L., Sec. 121, pages 1097-1099."

Further, it has been held that while estates by the entirety in Oregon have not been abrogated, joint tenancy except in cases of trustees and executors has been abolished.

Stout vs. Van Zante, 109 Ore. 430.

There are very few authorities cited by petitioner in support of the exemption right to one of

the spouses. As an instance, in the case of Cole vs. Cole, 126 Mich. 569, it can not be ascertained from the opinion whether one of the spouses, or both of the spouses made a claim for homestead exemption. It is quite possible under the Michigan statute if both spouses made a claim such a claim would be recognized. The case of Lozo vs. Southerland, 58 Mich. 168, is cited as a precedent. That is clearly a case where the husband and wife were conceded to be tenants in common. In fact, the court says:

> "The real question in the case is whether a homestead can be owned and occupied by husband and wife as tenants in common."

Considerable reliance is placed on the case of Jackson et al. vs. Shelton, 88 Tenn. 82, but mention is not made of the fact that **two of the Justices wrote a strong dissenting opinion,** and it is generally conceded that the case is not good authority on the point under consideration.

Justice Snodgrass in his dissenting opinion, and which was concurred in by Justice Lurton, points out some very pertinent considerations and makes a review of the Tennessee homestead exemption law, which is similar in many respects to the Oregon law. He says:

> "These provisions show, first, that the land subject to homestead must belong to the hus-

band in severalty, and especially, that they do not apply to lands held by the husband and wife in joint tenancy. Such land goes to the survivor on the death of either. . . . It is manifest, then, that a homestead on it would not inure to the benefit of his widow as such, and for her use and benefit, and that of her family residing with her, and upon her death to the minor children of her deceased husband, because on his death the entire fee would vest in her, and 'her family residing with her' could take no interest in it whatever, nor upon her death would it go to the minor children of her deceased husband. . . . ."

What are the interests of one tenant by an estate in entirety in the lands as compared with his rights to exemption under the Oregon statute?

First. He has the right to possession of all of the estate with his wife during their lifetimes.

McCurdie vs. Canning, 64 Pa. St. 39.

Second. He can not be divested of his interests by his individual creditors.

Under the Oregon statute, Sec. 222 Oregon Laws, the homestead consists, when not located in any town or city laid off into blocks and lots, of any

quantity of land not exceeding 160 acres, and when located in any such town or city, of any quantity of land not exceeding one block, provided such homestead shall not exceed in value the sum of $3000, and, therefore,

Third. He may have the right of unmolested enjoyment during his lifetime of the whole of the estate by the entirety whether the lands are used as a homestead and whether they exceed 160 acres in the country or one block in the city; and,

Fourth. As a tenant by the entirety its value, if capable of ascertainment from the peculiar nature of the estate, may exceed $3000, and to any sum whatsoever. Under the Oregon statute a homestead shall be exempt from sale on execution from the lien of every judgment, and must be the actual abode of the owner. (Ore. Laws, Sec. 221.) Such a homestead is not exempt from levy.

McCurdie vs. Canning, 64 Pa. St. 39.
Hanson vs. Jones, 57 Ore. 416, 109 Pac. 868.

Under the Oregon statute, when the owner of any homestead shall die, not having lawfully devised the same, such homestead shall descend free of all judgments and claims against such deceased owner to the persons and in the manner provided by law. Sec. 225 Oregon Laws.

Under Sec. 10125 Oregon Laws it is provided that

when any person shall die seised of real property, or any right thereto, the real property shall descend subject to his debts in equal shares to his or her children and to the issue of any deceased child by right of representation. If there be no child living at the time such real property shall descend to all of his or her lineal descendants, and if such descendants are in the same degree of kindred they shall take such real property equally, or otherwise they shall take according to the right of representation. If the intestate shall leave no lineal descendants such real property shall descend to his wife, or if the intestate be a married woman and leave no lineal descendant, then such real property shall descend to her husband, and if the intestate leave no wife or husband, then such real property shall descend in equal proportions to his or her father and mother. If the intestate shall leave no lineal descendants, neither husband, wife, nor father, the real property shall descend to his or her mother, and if the intestate shall leave no lineal descendants, neither husband, nor wife, nor mother, the real property shall descend to his or her father. If the intestate shall leave no lineal descendants, neither husband, nor wife, nor father, nor mother, such real property shall descend in equal shares to the brothers and sisters of the intestate and to the issue of any deceased brother or sister by right of representation.

There are further provisions under the statute of descent and distribution which are unnecessary for consideration here inasmuch as Sec. 225 of the exemption statute provides that the exemption shall not extend to any person other than the child, grandchild, widow or husband, and father or mother of the deceased owner. The exemption statutes provide that the homestead shall be charged with the expenses of last sickness, funeral and costs and charges of administration. Whereas, under the right in entirety the property immediately becomes the exclusive property of the surviving spouse free from any such claims.

Fifth. It will, therefore, be seen that the exemption statute provides that a homestead shall be allowed of certain quantity and certain value to an owner and must be his actual abode or occupied by his spouse, parent or child, and such homestead descends free from the debts of the owner to his children or grandchildren, father or mother, or surviving spouse. Therefore, the reasoning of Judge Snodgrass in his dissenting opinion in Jackson et al. vs. Shelton, hereinbefore referred to, is very close to the situation in Oregon. If a homestead could be carved out of and allowed to one spouse in an entirety estate it would necessarily descend in the manner provided by law. To carve out such a homestead, however, would be to deprive the surviving spouse of his or her rights under the law governing

estates by the entirety, for to create such a homestead would be to thereby take property of the other spouse in its very creation and to allow such a homestead would be to deny the surviving spouse the right to take the whole by survivorship. In an estate by the entirety the surviving wife, for instance, takes the whole of the property free of any claims or debts of the husband, whereas, under the rules of descent in the homestead statute the homestead will not descend to her except in the order named.

When Breneman filed his petition in bankruptcy his schedules contained a recital that he had lived on and occupied the property as his home since 1914, and that deed to the property was a joint deed to himself and wife. He did not claim to be the owner of the property, and when his trustee was elected the latter filed an objection to the claim of the bankrupt to have set aside as a homestead the real property described (Transcript of Record at page 51), for the reason the bankrupt had no just claim to a homestead in the lands and that said lands are not exempt. If, as it has been contended, it is the duty of the trustee to set off an exemption, what could he do? The interest of the bankrupt could not be severed from that of his wife. If the property was of greater value than $3000 he couldn't, as he would otherwise have a right to do under Sec. 224 Oregon Laws, pay the bankrupt $3000 and take the property free from homestead exemption claims.

The wife could properly claim that the $3000 should be paid to her or could ignore the transaction and insist on a homestead of her own. It is obvious that the trustee would have no right to interfere with any of the interests of the wife. And so long as estates by entireties are recognized it was both a legal and a physical impossibility for him to designate the homestead. Under the Oregon law he would be bound to deal with the owner, and the bankrupt is not the owner any more than the wife is the owner. Judge Snodgrass, in the opinion last referred to, commenting on this phase of the matter, says:

> "The third and fourth sections of the act provide for levy upon the real estate of the debtor upon which the homestead is situated by execution and attachment and directs that the levying officer shall summon three disinterested freeholders and have them set apart the homestead of the debtor out of the real estate levied upon, and they are to fix the precise boundaries, and the remainder of the lands are to be sold. If it is of greater value than $1000 and is so situated that it can not be divided so as to set apart the homestead, the freeholders shall certify the fact and the officers shall sell the whole and pay the proceeds to the Clerk of the Court rendering judgment or condemning the land for sale, and he shall under order of the court in-

vest $1000 in the purchase of a homestead for the family of the debtor and the creditor take the surplus. Now it is clear that this can not apply to an interest held jointly with the wife any more than with anyone else; because if it does so apply, it forces the sale of her land, and makes her take in lieu of all of it and all interest in it her family share in the part allotted as homestead, or in that purchased for the benefit of the family. This upon the theory that such is the effect that results under the law, and must result if this land is within its meaning. That these consequences could follow no one can maintain, and thus it appears that such an estate was never within the intent of the act."

The case of McRoberts vs. Copeland, 85 Tenn. 211, was cited, wherein it was held that such an interest as the wife's on survivorship could not be taken into consideration in fixing homestead, but the wife owned such land and a homestead must be set aside out of other lands of the husband.

We submit that the reason so few authorities directly in point can be found is a practical one. There must be comparatively few instances where debtors have asked to have allocated to them interests in land held by them as a tenant in entirety, for they necessarily would not want to take the lesser estates afforded to them under the various exemp-

tion statutes in lieu of the greater estates guaranteed to them by the law governing estates by the entirety.

In Oregon the debtor would only have the right to a homestead while he is actually occupying the premises as such. Breneman had this right assured to him when the deed to the premises was made to himself and wife by a common grantor. He could not make it any the more secure by filing a petition in bankruptcy and claiming an exemption.

In the brief in support of the motion to dismiss, the case of McCurdie vs. Canning, 64 Pa. St. 39, was cited and quoted from at length, and it was there held that possession of the property was insured to the spouses during their lifetime and to the survivor of them, free from any molestation on the part of either of them or the successors in interest of either of them. It would therefore follow that the homestead exemption statutes do not apply to common law estates held by the entirety and that the debtor has a greater interest through the entirety than can be forced upon him through the exemption statutes, particularly under such statutes as the statute of Oregon which provides his right to exemption is merely a right of enjoyment of the premises as a homestead so long as the homestead shall last.

WHO IS ENTITLED TO CLAIM A HOMESTEAD EXEMPTION UNDER THE OREGON LAW?

This question has been answered in part by what has already been said. The very few cases on the general subject are not in accord. It appears, however, that those holding that one spouse may claim a homestead exemption in an estate by the entirety do so because of the peculiar exemption statutes in the State or because of the peculiar views that some of the courts have taken with respect to estates by the entirety.

In the case of Sharp vs. Baker et al., 51 Ind. 547, 99 N.E. 44-46, there is a terse consideration of the matter. The question was then before the court on a petition for rehearing and it was urged that by virtue of the opinion a tenant by entirety is deprived of his right to claim the entirety property or any part thereof as exempt from execution. The court says:

> "If this is true it is not a result of the opinion in this case, but is a result which is incident to the nature of the estate. A tenant by entirety has no separate interest or property in the entirety estate which can be claimed as exempt. The right of an execution defendant to claim property as exempt extends only to property in which he has an individual interest.

> For this reason it has been held that a partner can not claim an exemption in the partnership property. (Here follows citations.) The fact that neither of the tenants by entireties can claim as exempt the entirety property, or any part thereof, as against a joint execution levied thereon seems to be a hardship; but the apparent hardship in such a case is not greater than that which results from the inability of a partner to claim as exempt his interest in partnership property. **It is the business of the courts to declare the law as it is and not to make law to relieve against hardships. If the law as it now is works an injustice the remedy must be sought in the legislature and not in the courts."**

This case is an effective answer to the plea of the petitioner to give a very lenient and strained construction to the exemption statutes of Oregon. It will be noted from the Oregon statutes that the word "owner" is used in five separate places. Not once is the word "owners" used. The legislature therefore must have intended that the word would be taken in its singular rather than its plural sense.

It is a better analogy to take partnership cases to reason from, for in those instances the courts had the entire partnership estate before them.

In the case of In re Scheier, District Court of Washington, 188 Fed. 744, 26 A. B. R. 739, Judge Rudkin, then District Judge, had before him the following question: Is a bankrupt, a member of a bankrupt partnership who is a householder as defined by the laws of the State of Washington, and at the time of the filing of his petition in bankrutcy having no individual assets from which to claim an exemption, entitled to set off to him as exempt firm assets being insufficient to pay firm creditors in full and his only copartner consenting to the allowance of the exemption claim by him from the firm assets? It was held that he could not, and the fact that the partner consented to the exemption did not change the rule, and in support of the opinion there was cited 18 Cyc. 1383, as follows:

> "By the great weight of authority individual partners can not claim exemptions in the partnership property as against a partnership debt. This is held on various different grounds: First, on the well known ground that partnership property is subject to the payment of partnership debts before all other claims; second, the impracticability or even inequity of allowing an exemption out of the property; third, that, under the theory of the civil law that a partnership is an entity—a theory not generally recognized by the common law and one which is inconsistent with its principles . . . and that

> the partnership property does not belong to the individual partners, but to the firm, that is, to the legal entity; fourth, that the different exemption statutes contemplate only individuals and have no reference to partnerships."

Number three quoted above may be paraphrased to be applicable here as follows: That under the theory of the common law an estate by the entirety is an entity; that is, the unity of husband and wife as one, and that the entirety property does not belong to the individual spouses, but to the husband and wife, that is, to the legal entity.

The same situation came before this court in the case of Jennings vs. Stannus & Son, 191 Fed. 347, 27 A. B. R. 384. Judge Wolverton wrote the opinion for the court and construed the meaning of the Washington law. It may be well at this point to note that the Washington law uses the word "householder" as distinguished from the word "owner." We quote from the opinion:

> "The statute here deals with individuals, and apparently with individual property. . . . The great weight of authority seems to be against the right of partners to the exemption. . . The strong reason in support of this view rests upon the innate difference between the individual and a co-partnership as it relates to their respec-

tive property rights. Each is a distinct entity. The former holds, by the exclusive right, subject only to the right of his creditors to have his property applied to their legitimate demands. Exemption statutes are enacted to meet this express condition, to relieve the debtor in a measure against the demands of his creditors, that he may yet enjoy the necessary comforts of life. The latter holds by right of the individual members, whose respective interests in the property depend upon mutual agreement between them; the whole being subject to the debts of the firm. The individual interest in the partnership property is joint and each partner has the right to have the property applied first to the partnership debts before either is entitled to a segregation of his own interests. Levy in execution, it is true, may proceed against the individual interests; but when made the sale is of the interest subject to the debts of the concern, and a settlement of the co-partnership affairs is necessary in the end to determine what the purchaser has really acquired. So that it seems illogical to say that exemption in favor of a partner is within the purview of the statute unless specially mentioned and declared."

Everything that is here said may be applied with even greater logic to individual exemption rights in

an estate held by the entirety. Each of the spouses has a right to have the entity estate applied against the joint debts. Indeed, under the Oregon statute (Sec. 9748 Oregon Laws) creditors may compel such an application. The entirety estate can not be dissolved except by the mutual consent or upon the death of one of the tenants.

It has been held in the case of Davis vs. Dodds, 20 Ohio State 473, that a husband occupying property which is the separate estate of his wife is not the "owner" within the meaning of the Ohio statute relating to homestead exemptions.

It is true that authorities may be found holding that the Married Woman's Property Acts, such as are in effect in Oregon, have abolished the estates by the entirety. This, however, is not the fact in Oregon. It has also been held that married women's property acts have qualified estates by the entirety, at least in so far as the husband's rights over the control of the wife's property is concerned. Such holdings may be inferred from what has already been decided in Oregon and in accordance with the weight of authority.

It is stated in 13 Ruling Case Law, Sec. 149, page 1129, as follows:

"In most jurisdictions, however, under stat-

utes which secure to married women the enjoyment of their real estate acquired during marriage as their separate property, it is held that an estate by entireties can not be sold on execution so as to affect in any way the rights of the wife therein, even during the life of the husband, and the purchaser at such a sale would have no right as against her to possession, and that though the statute does not entirely abolish estates by entireties and the husband's right as survivor still exists, such interest is not subject to sale on execution, not being a contingent or vested remainder but merely an incident of the estate. Likewise, it has been held that crops raised on the land cannot be sold on execution against the husband alone, because the crops are held in the same manner and subject to the same law as the land itself, and the same principle is applied to a judgment recovered as compensation for land taken under the power of eminent domain, though if the land is sold voluntarily, the husband's half of the proceeds of the sale, though remaining undivided, is subject to garnishment for the payment of his separate debts. It has also been held that a judgment against a husband is not a lien on land held by him and his wife as tenants by the entireties, and that therefore they may convey, clear from a judgment outstanding against him, land so held."

The qualified view taken by the courts with respect to the Married Woman's Property Act therefore strengthens the position of the trustee in his contention that under the Oregon statutes one of the spouses is not entitled to a homestead exemption in land held by the entirety.

THE LOGIC AND JUSTICE OF THE SITUATION

We have so far refrained from alluding to the petitioner's motion to expunge that part of the record requested by the trustee. We have done so in the belief that the court can now see that if such record was not before the court there would be in fact a concealment of the true conditions surrounding the administration of this estate, and that the full record was necessary for a proper consideration of the questions involved.

It is significant to remember that Edith Breneman, the wife of H. J. Breneman, is now also a bankrupt. So far as the lands covered by this entirety estate are concerned, what could be claimed in the Breneman estate could also be claimed in the Edith Breneman estate. It is obvious that there could not be two homestead exemptions in the same piece of property, and if the husband and wife as a unity might claim an exemption it is more obvious that there could not be three exemptions in the same

piece of property. This is the sophistry which counsel for the petitioner claims the Referee indulged in. If the debts in the Edith Breneman estate were liquidated so as to make it obligatory of her trustee to return the property the same family could thereby hold the property under the rules governing an entirety and at the same time hold it by virtue of the exemption statute. This may be more sophistry but it would seem nevertheless to be a result not to have been contemplated by the legislature when it created homestead exemptions. We have also made no mention so far of the fact that there is a life estate in this property in one John Allison. He would be entitled to possession under such an estate, and could either divest others of homesteads or perhaps create homestead rights in himself.

The administration of bankrutcy estates calls for sound equitable determinations. Fraud on creditors is never tolerated. The bankrupt husband and wife were very contented to allow the lands to be deeded by the Sheriff to a joint creditor, but as soon as they learned that the trustee was sufficiently able and diligent enough to acquire the Nayberger title, an exemption was attempted to be constructed. After the husband saw the effect of his wife filing a petition in bankruptcy he then commenced to show interest in his assumed exemption rights.

We have pointed out that at the time he went

into bankruptcy he had secured to him more than the exemption statutes could give him and at that time he was not seriously claiming that he had a right to an exemption. These rights are attempted to now be obtained as a reward to him for his subsequent acts. We have further pointed out, however, that even at the time he went into bankruptcy he was not, under the Oregon laws, entitled to a homestead exemption. He was not the owner of the lands, nor did he have such an interest in an estate as is embraced by the exemption statutes. The trustee could not allocate to Breneman an exemption if he were disposed to do so. Our conclusion therefore is that the decision of the referee and as affirmed by Judge Wolverton of the District Court is a correct decision in denying a homestead in the premises in question.

WM. B. LAYTON,

Attorney for Respondent.

State of Oregon
County of Multnomah } ss

I, the undersigned, of attorneys for Respondent hereby certify that I have prepared the foregoing copy of Brief and have carefully compared the same with the original thereof; and that it is a correct transcript therefrom and the whole thereof.

Portland, Oregon, dated Oct. 17 1924.

W. B. Lynch